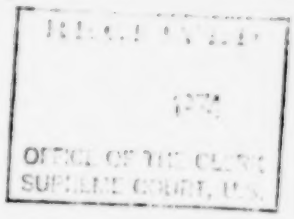
IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974



No. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners

vs.

LINDA ALCALA, JANE DOE and JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 53(1) of the Rules of this Court, Motion is hereby made that the Respondents, Linda Alcala, Jane Doe, and Joan Roe, individually and on behalf of the members of the class which they represent, be allowed to proceed in forma pauperis without prepayment of costs or submission of printed copies of the Brief in Opposition to Petition for Writ of Certiorari. In support of said Motion, Respondents state as follows:

1. All members of the class represented by the named Respondents are, by definition, in poverty. They are all indigent women who would be eligible for AFDC benefits if their children were not as yet unborn.

2. Respondents were permitted to proceed in forma pauperis in the district court and in the circuit court of appeals.

3. Respondent Jane Doe's Affidavit in support of this Motion is attached hereto.

Robert Bartels

Robert Bartels
Counsel for Respondents
University of Iowa
College of Law
Iowa City, Iowa 52242

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vs.

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Respondents

AFFIDAVIT

STATE OF IOWA)
) ss.
COUNTY OF SCOTT)

I, Mary Passafaro, being first duly sworn according to law, depose and say, in support of my Motion for Leave to Proceed In Forma Pauperis without being required to prepay costs or fees:

1. I am the Respondent Jane Doe in the above-entitled case.

2. Because of my poverty, I am unable to pay the costs of said case.

3. I am unable to give security for the same.

4. I believe I am entitled to the redress I seek in this case.

5. The nature of said case is briefly stated as follows: I brought a class action suit in forma pauperis together with Joan Roe in the United States District Court for the Southern District of Iowa seeking a declaratory judgment and injunctive relief against the Petitioners under Title 42 U.S.C. § 1983. The District Court issued a declaratory judgment decreeing that Petitioners' interpretation of Title 42 U.S.C. § 606(a) was in error. The Court held that the Social Security Act should be read to include unborn children within the class of "dependent children" eligible for AFDC benefits, and the Petitioners were enjoined from denying Respondents or members of the class AFDC benefits solely because their children were as yet unborn. The United States Court of Appeals for the Eighth Circuit affirmed this judgment of the District Court.

_____

Mary Passafaro

Duly witnessed and sworn to before me, a Notary Public, this _____ day of _____, 1974.

_____

Notary Public in and for Iowa

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SUPREME COURT, U.S.

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vs.

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Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Robert Bartels
University of Iowa
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Iowa City, Iowa 52242

COUNSEL FOR RESPONDENTS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals, which has not as yet been published, appears in Appendix A of the Petition. The opinion of the District Court is reported at 362 F.Supp. 180, and is included as Appendix A of this Brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Did the petitioners' exclusion of unborn children and their mothers from eligibility for AFDC assistance under the federal Social Security Act violate the Social Security Act and hence violate the Supremacy Clause?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The Supremacy Clause of the Constitution of the United States and the pertinent portions of the Social Security Act [42 U.S.C. §§ 602(a)(10), 602 (a)(17), 606(a)] and federal regulations [45 C.F.R. §§ 233.90(c)(2), (3)] are set forth in Appendix C of the Petition. In addition, the pertinent portions of HEW Handbook for Public Assistance, Part IV, § 3412, June 30, 1947 Supplement for Administrative Use, are set forth in Appendix B of this Brief.

STATEMENT OF THE CASE

The Statement of the Case is adequately set forth in the Petition.

ARGUMENT

A writ of certiorari should not be granted in this case for two primary reasons. First, the decision below clearly was a correct application of principles which have been well established by prior holdings of this Court, most significantly King v. Smith, 392 U.S. 309 (1968), Townsend v. Swank, 404 U.S. 282 (1971), and Carleson v. Remillard, 406 U.S. 598 (1972). Thus, the questions presented by this case are not sufficiently significant to warrant discretionary review by this Court. Second, despite the considerable volume of litigation on the issue of the eligibility for AFDC assistance of mothers with unborn children, there is no conflict in the courts of appeals: In addition to the Court below, the Fourth Circuit (Doe v. Lukhard, 493 F.2d 54 (4th Cir. 1974), affirming, 363 F.Supp. 823 (E.D. Va. 1973), petition for certiorari filed May 29, 1974) and the Seventh Circuit (Wilson v. Weaver, _____ F.2d _____, 7th Cir. Nos. 73-1541, 73-1749, 73-1834, and 73-1835, May 9, 1974) have held that mothers with unborn children are eligible for AFDC assistance under the Social Security Act. No circuit court of appeals has ruled to the contrary.

I.
THIS CASE WAS CORRECTLY DECIDED BY THE COURT BELOW ON THE BASIS OF PRINCIPLES CLEARLY ESTABLISHED BY PREVIOUS DECISIONS OF THIS COURT, AND THEREFORE NO SIGNIFICANT FEDERAL QUESTION IS PRESENTED

The decisions of both the District Court and the Court of Appeals in this case were based on clear-cut applications of three holdings of this

Court in the area of Aid to Families with Dependent Children (AFDC): King v. Smith, Townsend v. Swank, and Carleson v. Remillard, supra. 362 F.Supp. at 183-84; App. A of Petition, at 3a-4a. For purposes of this case, two related principles from the King-Townsend-Carleson triad are especially important. First,

> in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.

Townsend v. Swank, supra, at 286; see also, Carleson v. Remillard, supra, at 600. Second, federal courts are not to defer to HEW's practice of making benefits to eligible persons "optional" with the states unless there exists similar clear authorization for such optionality in the Social Security Act or its legislative history:

> the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402(a)(10) that aid be furnished to 'all eligible individuals.'

Townsend v. Swank, supra, at 286; Carleson v. Remillard, supra, at 602 (emphasis supplied by the Court).

In King v. Smith, supra, this Court, on the basis of the principles outlined above, invalidated an Alabama policy which denied AFDC benefits to children of mothers who "cohabited" with an able-bodied man, rejecting the justification that such a man was a substitute "parent" who was present in the home within the meaning of 42 U.S.C. § 606(a). 392 U.S. at 330. In Townsend v. Swank, supra, this Court invalidated Illinois' policy of denying AFDC benefits to age-qualified dependent children attending a college or university, holding that such a denial conflicted with the Social Security Act's provision that such students were to be included as beneficiaries, 42 U.S.C. § 606(a)(2)(b), and rejecting HEW's argument that the states had an option to exclude such students. 404 U.S. at 286, 288. Carleson v. Remillard, supra, invalidated a long-standing California policy which denied benefits to families in which one parent was absent "by reason of military service." California maintained

that such an absence was not a "continued absence" within the terms of 42 U.S.C. § 606(a)(1) and that its decision not to grant AFDC to families of absent servicemen was a valid extension of its power to allocate AFDC resources; in support of these contentions, HEW argued that the states had an "option" to decide whether a military absence should be interpreted as a "continued absence." This Court clearly rejected both California's interpretation of "continued absence" and HEW's claim of "optionality," citing Townsend. 406 U.S. at 601-602.

Similarly in the instant case, the Court of Appeals and the District Court held that unborn children were eligible for AFDC assistance under the Social Security Act, that there was no clear congressional authorization for their exclusion from assistance, and that HEW's policy that eligibility for unborn children was optional with the states was not authorized by the Act or its legislative history. Alcala v. Burns (8th Cir. No. 73-1595, March 29, 1974), App. A of Petition, at 4a-6a; 362 F.Supp. at 182-86. The Court of Appeals, like the District Court, began by determining that the term "dependent child" in the Social Security Act, 42 U.S.C. § 606(a), encompasses an unborn child, and that the unborn child and his or her mother therefore are eligible for AFDC assistance. In so doing, the Court relied both on HEW regulations, which have long interpreted the term "dependent child" to include unborn children, see, 45 C.F.R. §§ 233.90(c)(2), 233.90(c)(3),[1] and on the purposes of the Social Security Act. App. A of Petition, at 5a; see also, 362 F.Supp. at 184-85. Both the Fourth Circuit Court of Appeals (relying on the analysis of the District Court for the Eastern District of Virginia) and the Seventh Circuit Court of Appeals reached the same conclusion. Doe v. Lukhard, supra, 493 F.2d at 60, 363 F.Supp. at 829; Wilson v. Weaver, supra.

Contrary to the argument of the petitioners (Petition, pages 8-9), the Eighth Circuit Court of Appeals found that neither the Social Security Act nor its legislative history indicated in any way (let alone "clearly evidenced") that unborn children or their mothers were to be excluded from the definition

[1] As early as 1941, the Social Security Board informed all states that unborn children were "dependent children" eligible for AFDC benefits. Transmittal Sheet for Board Action and Memorandum, May 10, 1941, and further cited in the Handbook of Public Assistance, Part IV § 3412, June 30, 1947 Supplement for Administrative Use. See, App. B.

of "dependent child" or from AFDC coverage at the option of the states. App. A of Petition, at 5a; see also, Doe v. Lukhard, supra, 363 F.Supp. at 826; Wilson v. Weaver, supra. It is of course true, as petitioners point out (Petition at 8), that certain provisions of the Social Security Act apply only to born children; but this certainly does not imply that the entire act is so restricted. For example, petitioners cite 42 U.S.C. § 602(a)(17), which provides for the determination of the paternity of a "child born out of wedlock." The petitioners' argument seems to be that this provision implies that the entire AFDC act is restricted to born children. But the determination of paternity provided for in § 602(a)(17) is only one narrow aspect of the AFDC scheme, and has no necessary relationship to the definition of "dependent child" or the determination of eligibility. Moreover, this is an aspect of the statutory scheme which rationally could apply only to born children, since a child is by definition not illegitimate until birth. Finally, this example illustrates the inherent illogic of the petitioners' argument, since its logical extension would be that § 602(a)(17) effectively also limited the coverage of the entire AFDC program to children born out of wedlock.

The petitioners' citations of legislative history (Petition at 8-9) are equally unconvincing, and were considered and rejected by the District Court and Court of Appeals. The phrases cited--which largely are lifted out of context from speeches of individual Congressmen given after passage of the Social Security Act--show little or nothing about the meaning of the Act or the meaning of "dependent child." Moreover, the history of the 92nd Congress' consideration--and rejection--of amendments to specifically exclude unborn children from AFDC coverage (Petition at 8, fn. 1) is at best ambiguous and inconclusive. Indeed, Congress' consideration of amendments to exclude unborn children would seem more likely to indicate its recognition that unborn children presently are included in the coverage of the Social Security Act.

Nor is the fact that HEW views coverage of unborn children to be optional with the states persuasive. As noted above, this Court has on at least two recent occasions specifically rejected the notion that HEW, as opposed to Congress, has the right to create optional AFDC programs unless such optionality is clearly evidenced in the Social Security Act or legislative history.

Townsend v. Swank; Carleson v. Remillard, supra. HEW regulations do correctly recognize that unborn children are "dependent" children, 45 C.F.R. §§ 233.90 (c)(2), 233.90(c)(3); but given that unborn children are "dependent children" under 42 U.S.C. § 606(a), it is clear from Townsend and Carleson, supra, that the provision of assistance to unborn children is mandatory, and not optional, for those states who participate in the AFDC program.[2]

In support of their theory that this case is not covered by the King-Townsend-Carleson triad, the petitioners rely on one sentence and a footnote lifted out of context from this Court's decision in New York Department of Social Services v. Dublino, 413 U.S. 405 (1973).[3] Significantly, petitioners avoid discussion of the holding of Dublino. The basic idea advanced by the petitioners is that in King, Townsend, and Carleson, the Social Security Act "expressly provided" that the persons excluded by the challenged state regulations would be eligible for assistance, whereas in this case, the eligibility of unborn children is "ambiguous and unclear." But this simply reads far too much into the quoted language from Dublino. And in any event, what the Court of Appeals and the District Court held below was precisely that 42 U.S.C. § 606(a) "expressly provided" for the eligibility of unborn children as "dependent children." An unborn child certainly is as expressly included in the term "dependent child" as a "substitute" parent is excluded from the term "parent" (King v. Smith, supra) or as a military absence is included in the term "continued absence" (Carleson v. Remillard, supra).[4]

More significantly, the context and holding of Dublino clearly show that it does not "qualify" the King-Townsend-Carleson triad and that it is totally inapposite to this case. Unlike this case, Dublino did not deal with exclusions

[2]Respondents are not able to understand the basis of petitioners' allegation that the ruling below gave HEW "quasi-legislative powers." Petition at 4, 10. On the contrary, the Circuit Court decision rightly stripped HEW of the "quasi-legislative powers" the agency had created in itself when it led states to believe they had an option to decide whether or not unborn children were eligible for AFDC assistance.

[3]"In those cases [King, Townsend, and Carleson] it was clear that state law expressly excluded people from AFDC benefits whom the Social Security Act expressly provided would be eligible," 413 U.S. at 421; "and 'so long as the States' actions are not in violation of any specific provision of the Constitution or the Social Security Act,' the courts may not void them." 413 U.S. at 423, n. 29.

[4]Indeed, the petitioners' attempted distinction is belied by their own analysis of King v. Smith (Petition at 7), which demonstrates that the Court in King interpreted "parent" on the basis of legislative purposes and the use of the term "parent" in the general statutory scheme.

of applicants for AFDC in conflict with definitions of the Social Security Act. The issue in Dublino was whether "that part of the Social Security Act known as the Federal Work Incentive Program (WIN)" completely pre-empted the use of state work programs in the administration of the AFDC program. 413 U.S. at 407. This Court ruled that there was no complete pre-emption--but remanded the case to the lower court to determine whether any particular sections of the state rules conflicted with the Social Security Act. Significantly, this Court pointed to Townsend v. Swank, supra, as the polestar in determining whether any such conflict existed. 413 U.S. at 421-423. Moreover, the Dublino opinion recognizes that the Social Security Act itself "allows for complementary state work incentive programs and procedures incident thereto . . . ." 413 U.S. at 422. Hence, the broad challenge in Dublino to the existence of any state imposed work requirements was untenable under the King-Townsend-Carleson tests, since congressional authorization for such requirements was "clearly evidenced" in the Act.[5]

In sum, the Court of Appeals and the District Court in the instant case, like the Fourth and Seventh Circuits in Doe v. Lukhard and Wilson v. Weaver, supra, have simply applied principles which have been repeatedly enunciated by this Court in King v. Smith, Townsend v. Swank, and Carleson v. Remillard, supra. Those principles being well established and clearly applicable to the instant case, this Court should not exercise its discretionary power to review yet another AFDC eligibility case in which the peripheral question of statutory interpretation affects only a relatively minor aspect of the AFDC scheme and was correctly decided below.

II.
THERE IS NO CONFLICT IN THE CIRCUIT COURTS OF APPEALS ON THE ISSUE INVOLVED IN THIS CASE

The petitioners emphasize the present conflict in the district courts on the issue presented by this case; significantly, little is said about the courts

[5]From a somewhat different perspective, King, Townsend, and Carleson all dealt with the question of whether certain categories of individuals fit within 42 U.S.C. § 606(a)'s mandatory definitions of the persons who must be furnished with AFDC under 42 U.S.C. § 602(a)(10), while the Dublino holding dealt only with "supplementary regulations promulgated within the legitimate sphere of state administration." 413 U.S. at 422. Clearly, the instant case also involves definitional eligibility under § 606(a).

of appeals. Of course, as the Petition shows, the weight of authority is highly favorable to the respondents: while four district courts have ruled for defendants,[6] ten district courts have ruled for plaintiffs, and two other courts have found that the plaintiffs are likely to succeed on the merits and hence have granted a preliminary injunction. Petition at 5. More importantly, however, a conflict in the district courts is simply irrelevant to the granting of a writ of certiorari: It is a conflict in the courts of appeals which is the relevant, though not controlling, consideration governing this Court's review on certiorari. Rule 19, United States Supreme Court Rules.

At the time of the filing of the Petition in this action, both the Fourth and the Eighth Circuit Courts of Appeals had ruled in favor of the plaintiff-appellees, Doe v. Lukhard, Alcala v. Burns, supra, while no circuit court of appeals had ruled to the contrary. Since the Petition was filed, the Seventh Circuit also has ruled that unborn children are included in the coverage of the AFDC program, Wilson v. Weaver, supra. Thus, the three Courts of Appeals which have ruled on the issue involved in this case are unanimous, and there is therefore no present need for this Court to resolve any conflict between the circuits. Insofar as there is conflict among certain federal district courts, the task of resolving that conflict should be left to the courts of appeals, one of whose functions it is to resolve conflicts among the district courts within their respective circuits. If a conflict among the circuits arises at a later time, the Court may determine that plenary review of the issues presented is warranted. However, at this time, when no conflicts among the circuits have yet arisen, review in this Court is not necessary, and it is appropriate that the Court await the possible development of a conflict among the circuits before considering plenary review of the relatively minor statutory point raised in this case.

---

[6]Of the five district court cases cited by petitioners as support for the exclusion of unborn children and their mothers from AFDC assistance, two, Poole v. Endsley, ____ F.Supp. (N.D. Fla., No. 74-22, 1974), and Geissler v. Endsley, ____ F.Supp. ____ (N.D. Fla., No. 74-3, 1974), were decided in the same district court by the same district judge.

CONCLUSION

Because this case was correctly decided below, because no significant federal issue is presented, and because there is no conflict in the circuit court of appeals, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENTS

APPENDIX A

The text of the District Court's opinion in this case, Alcala v. Burns, 362 F.Supp. 180 (S.D. Ia. 1973), was not included in the Appendix to the Petition and is set forth below:

Linda ALCALA, Individually and on behalf of all other persons similarly situated, Plaintiff,

v.

Kevin J. BURNS, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and Michael Ryan, Individually and in his capacity as Director of the Scott County Department of Social Services, Defendants.

Jane DOE and Joan Roe, Plaintiffs,

v.

Kevin J. BURNS, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and Michael Ryan, Individually and in his capacity as Director of the Scott County Department of Social Services, Defendants.

Civ. Nos. 73-86-2, 73-110-2.

United States District Court, S. D. Iowa, C. D.

July 31, 1973.

Stay Granted Oct. 9, 1973. See 94 S.Ct. 26.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT.

HANSON, Chief Judge.

In these consolidated causes of action, brought pursuant to Title 42 U.S.C. Section 1983, the plaintiffs ask this Court to declare invalid, and enjoin defendants from continuing, acts by which defendants deny A.F.D.C. assistance to pregnant mothers and their unborn children. Defendants have denied A.F.D.C. assistance to these plaintiffs pursuant to their interpretation of an Iowa Department of Social Services regulation, such interpretation being that A.F.D.C. assistance is not available to otherwise eligible pregnant women whose children have not been born. The defendants claim that neither the Federal statutes governing A.F.D.C. nor the Iowa Regulations contemplate A.F.D.C. payments for an unborn child.

On April 4, 1973, this Court entered a temporary restraining order enjoining the defendants from denying A.F.D.C. payments to Linda Alcala on the sole basis that her child was not yet born. On May 16, 1973, a similar action was filed by plaintiffs Jane Doe and Joan Roe. This cause of action was consolidated with Alcala v. Gillman and a temporary

restraining order was issued restraining the defendants from denying A.F.D.C. payments to these plaintiffs on the sole basis that their children are not yet born.

On May 29, 1973, a trial was held to determine the issues in the above two causes of action. The following will constitute the Findings of Fact, Conclusions of Law, and Order for Judgment.

Jurisdiction of the Court is invoked pursuant to Title 42 U.S.C. Section 1983, Title 28 U.S.C. Section 2201, and Title 28 U.S.C. Section 1343.

FINDINGS OF FACT

1. The plaintiffs are unmarried pregnant women with unborn children, are currently unemployed, and have no savings.

2. The plaintiffs applied to the Scott County Department of Social Services for A.F.D.C. assistance, but were denied such assistance because of the Scott County Department's interpretation of Section V, Chapter 5 of the Iowa Department of Social Services Manual. As interpreted by the defendants, this provision does not provide for A.F.D.C. assistance to an otherwise eligible pregnant woman whose child is not yet born.

3. The plaintiffs met all eligibility requirements for A.F.D.C. assistance except that their children were not yet born.

4. Stipulated testimony of Dr. Roy M. Pitkin, obstetrician and gynecologist, (Plaintiffs' Exhibit 2) stated that the nutrition of a mother during pregnancy is an important determinant of the health and condition of the child and that there is a substantial likelihood that the health of a child may be adversely affected as a result of the pregnant mother's inadequate nutrition. He also stated that proper medical attention during pregnancy is important to protect the mother's health, which in turn affects the health and development of the child.

5. The defendants in this cause of action are Kevin J. Burns, Acting Director of the State of Iowa Department of Social Services, and Michael Ryan, Director of the Scott County Department of Social Services.

[1] 6. The Court finds that this is an appropriate class action under Rule 23 of the Federal Rules of Civil Procedure.

CONCLUSIONS OF LAW

The plaintiffs assert their right to A.F.D.C. payments on three theories. First, they allege that the defendants' interpretation of Iowa's A.F.D.C. provisions, which deny payments to otherwise eligible pregnant women whose children have not been born, conflicts with eligibility provisions of Title 42 U.S.C. Section 606(a), and thus is invalid and unconstitutional under the Supremacy Clause. The second two theories allege that the actions of the defendants in denying A.F.D.C. payments and their interpretation of Title 42 U.S.C. Section 606 a), and the Employees Manual violate the plaintiffs' right to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution. Because of the Court's holding upon the Supremacy Clause theory, it will not be necessary to reach the "equal protection" and "due process" arguments.

The Supremacy Clause Argument.

[2] The plaintiffs claim that the term "dependent child" as defined in Section 406(a) of the Social Security Act. Title 42 U.S.C. Section 606(a) [1] encompasses an unborn child for purposes of determining eligibility for A.F.D.C. payments. They further argue that since a mother with an unborn child is

1. This Section provides "(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from home, or physical or mental incapacity of a parent, and who is living with his father, mother . . . and (2) who is (A) under the age of eighteen. . . ."

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eligible under the Federal statute, the states cannot pursue more restrictive eligibility requirements lest they be in violation of the Supremacy Clause.

The law concerning eligibility requirements for A.F.D.C. has been dealt with by a long line of recent Supreme Court decisions. King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968); Wyman v. James, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971); Townsend v. Swank, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971); Lewis v. Martin, 397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561 (1970); Carleson v. Remillard, 406 U.S. 598, 92 S.Ct. 1932, 32 L.Ed.2d 352 (1972); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

Several propositions relevant to these causes of action become clear from the law stated in these opinions. King v. Smith, *supra*, in interpreting the effect of Section 402(a) of the Social Security Act, Title 42 U.S.C. Section 602 a.[2] held that the Social Security Act determined eligibility standards for A.F.D.C. and that state provisions which had the effect of narrowing those eligibility standards were to that extent invalid because of the Supremacy Clause.

Townsend v. Swank, *supra*, 404 U.S. at 286, 92 S.Ct. at 505, in interpreting the dictates of King v. Smith stated:

> "Thus King v. Smith established that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance, under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. We recognize that HEW regulations seem to imply that States may to some extent vary eligibility requirements from federal standards. However, the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of Section 402(a)(10) that aid be furnished 'to *all eligible individuals.*'"

Carleson v. Remillard again reiterated the same proposition as the aforementioned cases in invalidating a California regulation which denied A.F.D.C. payments to otherwise eligible individuals on the basis that absence from home for military service did not constitute "absence from home" for purposes of satisfying A.F.D.C. eligibility requirements.

From *King*, *Townsend*, and *Remillard*, the following related principles have been set forth by the Supreme Court:

(1) The states may not impose more restrictive eligibility conditions for receiving A.F.D.C. than those set out in the Social Security Act;

(2) In order to exclude an applicant who would have been covered under the Social Security Act, the state must rely upon legislative history or statutory language "clearly evidencing" Congressional intent to allow the exclusion of the applicant;

(3) HEW regulations purporting to make eligibility for certain groups of applicants optional with the states are of no effect in the absence of Congressional intent to allow such exclusions.

Since there appears to be no convincing argument by the defendants that there is a specific Congressional exclusion or intent to allow the exclusion of unborn children and the Court can find no such intent, the Court's inquiry must

2. This section provides that: "A State plan for aid and services to needy families with children must . . . (10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness *to all eligible individuals.* . . . (Emphasis added)

be directed to whether the term "dependent child" in Title 42 U.S.C. Section 606(a) *includes* coverage for the "unborn child." If such coverage is in fact intended by the Social Security Act, the Court would be compelled under the precedents cited above to find for the plaintiffs.

The plaintiffs argue that the Social Security Act contemplates coverage for the "unborn child" when it provides coverage for a "dependent child." It is first contended that the plain language of the statute implies they are to be included and that there is no indication in the statutory language that mothers with unborn children are to be excluded from coverage. They point to the definition by Webster's New International Dictionary (Second Edition Unabridged) which defines "child" as: "An unborn or recently born human being; fetus; infant; baby. . . ." The defendants argue just as ardently that the clear language of the Social Security Act constantly refers to children in being and that nowhere is "unborn child" referred to. The defendants argue that the customary meaning of the word "child" is that of a born person.

In any event, the Court does not find this venture into the plain meaning of the term "dependent child" extremely fruitful. It is obvious that the "plain language" of the statute is not as plain as both parties contend and is surely not conclusive for the plaintiffs or the defendants. It is ascertainable, however, that an "unborn child" is not specifically excluded by the language of the Act.

Given this ambiguity in the statute, the Congressional intent becomes more important and is a more fruitful inquiry. Title 42 U.S.C. Section 601 authorizes funds:

> "For the purpose of encouraging the care of dependent children in their homes . . . by enabling each state to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents . . . to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of *continuing parental care and protection.* . . ." (Emphasis added).

Inclusion of the "unborn child" is consistent with the purposes of the Act above stated. The stipulated testimony of Dr. Roy Pitkin clearly states the additional needs of the child and mother during this prenatal period and the serious consequences that flow to the family if the nutritional and medical needs of the child are not met during this prenatal period. Meeting of these family needs is consistent with the purposes of the A.F.D.C. program stated above. As stated in Carleson v. Remillard, *supra*, 406 U.S. at 604, 92 S.Ct. at 1936:

> "We cannot assume here, anymore than we could in King v. Smith, *supra*, that while Congress 'intended to provide programs for the economic security and protection of *all* children,' it also 'intended arbitrarily to leave one class of destitute children entirely without *meaningful* protection.' 392 U.S., at 330, 88 S.Ct., at 2140."

The term "dependent child" is broad enough to encompass an "unborn child" and the coverage for "unborn children" is consistent with the purposes of the Social Security Act. No credible argument can be made that Congress intended to exclude "unborn children" from coverage under this Act. Therefore the Court concludes that coverage for "unborn children" is contemplated by the Social Security Act.

This conclusion is strengthened by a reading of the relevant regulations of the Department of Health, Education and Welfare. The Code of Federal Reg-

ulations, 45 C.F.R., Section 233.90 provides that:

"(c)(2) Federal financial participation is available in:

. . .

(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis. . . ."

Since 1946 it has been the policy of HEW that payments are authorized on behalf of "unborn children." The position of HEW, as stated in their amicus brief filed by the defendants, is that Section 233.90(c)(2) is an optional program to the states and that just because these regulations *allow* coverage of unborn children does not dictate that coverage is required.

[3] If, however, this so-called optional program of HEW is a valid program, the power to promulgate this Regulation would flow from the Social Security Act. As stated in the defendants' Brief on page 7:

"However, it is equally clear that such regulations may not go beyond the limits of the Act or law on which such regulations are based. Townsend v. Swank, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971)."

The fact that HEW has allowed payments to "unborn children" since 1946 under this Act and the fact that Congress has acquiesced in this position is a most convincing argument that the Social Security Act encompasses eligibility for the parent with an "unborn child." The Court again concludes that "unborn children" are eligible for A.F.D.C. benefits under the Social Security Act and that under the precedents of *King*, *Townsend* and *Remillard* and the Eighth Circuit cases of Rosen v. Hursh, 464 F.2d 731 (8 Cir. 1972) and Doe v. Gillman, 479 F.2d 646, No. 72-1605 (8th Cir., 1973), the defendants cannot enforce more strict eligibility requirements than those requirements in the Federal statute.

Lower Court Opinions Considering the Same Question Presented to this Court.

There are two United States District Court cases reaching conflicting decisions in which the issue was whether a state regulation denying A.F.D.C. assistance to pregnant women and their unborn children solely on the basis that the children are unborn is inconsistent with the Social Security Act and therefore invalid under the Supremacy Clause. Parks v. Harden, 354 F.Supp. 620 (N.D. Ga., 1973) denied A.F.D.C. payments to the plaintiff. Wilson v. Weaver, No. 72-C-1960 (N.D.Ill., Dec. 26, 1972) (Order on preliminary injunction) found on the basis of the Supremacy Clause that the plaintiff in that cause of action was entitled to receive A.F.D.C. payments even though the child was not yet born.

The determining factor in the differing results that were reached is that Judge Smith in Parks v. Harden, when he searched the statute and legislative history, was looking for a very specific inclusion of "unborn children" which he did not find. Therefore he concluded that unborn children were not covered. This Court believes the proper approach is to look at the term "dependent child" and see whether it could be broad enough to include coverage for the "unborn child" in light of the overall purpose of the Act. This Court concludes, as did Wilson v. Weaver, that the term "dependent child" is broad enough to encompass an "unborn child" and that an interpretation of the Federal eligibility requirements which includes coverage for "unborn children" is consistent with, and in furtherance of, the overall purpose of the A.F.D.C. provisions of the Social Security Act.

Parks v. Harden also accepted HEW's position that the "unborn children" program under their regulation, Title 45 C.F.R., Section 233.90(c)(2)(ii), is optional even given the language of *King*, *Townsend* and *Remillard*. The *Parks* opinion did not explain from where the

authority for a so-called optional program was derived if such coverage was not contemplated by the Social Security Act. The Wilson v. Weaver court found that the HEW regulation supported the proposition that coverage for "unborn children" was contemplated by the Social Security Act and correctly concluded under the *King*, *Townsend* and *Remillard* cases that these federal eligibility standards can not be restricted by a State under the guise that the program is optional.

The Court now directs its attention to an unpersuasive but intriguing argument that asserting that an "unborn child" is a "dependent child" within the meaning of the Social Security Act is in total conflict with the abortion case, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) which held that an "unborn child" is not a person within the protection of the Fourteenth Amendment. In this lawsuit the Court is determining whether Congress intended to provide for a mother and her "unborn child" under the A.F.D.C. provisions. The fact that a child is not protected as a person under the United States Constitution is not relevant to the above inquiry. The payments are made to the family and not the "unborn child" and the mother is asserting her right to payments.

The Abstention Argument.

[4] The defendants argue that this Court should stay its hand pending the determination of these issues by the Iowa Court. Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970); Department of Social Services of Iowa v. Dimery, 398 U.S. 322, 90 S.Ct. 1871, 26 L.Ed.2d 265 (1970) and Bascom and Hightower v. Perry, D.C., 337 F.Supp. 431, are cited as authority for this proposition. In this case, however, we are determining the applicability of federal law. There is no determination of a State law involved. Abstention is not appropriate in these circumstances.

ORDER FOR JUDGMENT

[5] The final matter for this Court to determine is the relief to be granted to the plaintiffs and their class. The Court will grant the declaratory and injunctive relief prayed for, but will not allow the claims for retroactive payments wrongfully withheld. In Doe v. Gillman, 479 F.2d 646, No. 72-1605 (8th Cir., 1973), the Eighth Circuit refused to grant retroactive payments in circumstances involving wrongfully withheld A.F.D.C. payments on the basis that Section 55.16(217) of the 1973 Iowa Departmental Rules provided for retroactive payments and was thus the process that should be taken by the aggrieved plaintiffs.

"When the hearing decision is favorable to the claimant, or when the agency decides in favor of a claimant prior to the hearing, corrective payments, retroactive to the date of incorrect action, *shall* be made." (Emphasis added).

Once the rights of these parties have been determined, this Court cannot presume that the Iowa officials will not follow their own designated procedure for awarding relief.

It is ordered that the above shall constitute the Findings of Fact, Conclusions of Law and Order for Judgment in the above entitled cause of action.

APPENDIX B

Transmittal Sheet for Board Action and Memorandum, May 10, 1941; Handbook of Public Assistance, Part IV § 3412, June 30, 1947 Supplement for Administrative Use (pertinent portions):

> 1. Aid to Dependent Children, as a program designed to meet the needs of children deprived of parental support and care under conditions specified in Federal and State legislation should properly be available to meet such needs in any of the circumstances in which they arise.
>
> 2. It has been generally recognized, abroad and in this country, that the State has an interest in the health and well-being of its children, and that it should provide assistance to insure their sound and healthful development. Since the circumstances of the pre-natal period affect the child's development, the State is rightly concerned in providing for the needs that are created by the child's existence during the pre-natal period.
>
> 3. The needs created by the child's existence must be supplied through the mother, during the pre-natal period. The needs of the child are met only as the mother's needs, economic, social, and medical, are adequately cared for throughout the period of pregnancy.